



**JURISDICTION AND VENUE**

4. This is an action for false advertising arising under 15 U.S.C. § 1125(a).

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1332 (a) (1), and 1338(b). The amount in controversy, upon information and belief, exceeds \$75,000.00.

6. Venue is proper in this court under 28 U.S.C. §§ 1391 (b) and (c).

**FACTS**

**Exergen and its Innovations**

7. Exergen is a leading innovator in the field of medical thermometry.

8. Exergen's founder and president, Francesco Pompei, is the inventor of more than sixty issued United States patents.

9. Exergen manufactures and sells products including the TemporalScanner, which has received a number of accolades, including the New England Innovation Award in 2002, the Greater Boston Chamber of Commerce Award in 2006, the Most Valuable Product Award from a nursing organization, and was selected as one of 24 "Smartest Products of the Decade" by Inc. Magazine.

10. Exergen sells the TemporalScanner to consumers.

11. Exergen also sells a professional model of the TemporalScanner for use such as in hospital settings.

12. Exergen's TemporalScanner is used by scanning the forehead of the person whose temperature is being taken.

13. With a gentle stroke of the forehead the TemporalScanner captures the naturally emitted heat from the skin over the temporal artery, taking 1,000 readings per second, selecting

the most accurate. The TemporalScanner measures ambient temperatures, mathematically replaces the small temperature loss from cooling at the skin, and displays an accurate arterial temperature.

**ASR and Kidz-Med**

14. American Scientific Resources (“ASR”) is a publicly held company.

15. Kidz-Med is a wholly owned subsidiary of ASR that is controlled by ASR’s management.

16. Dr. Christopher Tirotta is the President and Chief Executive Officer of ASR and Kidz-Med.

**ASR and Kidz-Med’s Advertising of the Kidz-Med Thermofocus**

17. ASR, through Kidz-Med, advertises, offers for sale and sells thermometers manufactured by Italian company Tecnimed S.R.L., known as Thermofocus thermometers, under the designation Kidz-Med Thermofocus in the United States.

18. The Kidz-Med Thermofocus thermometer is marketed and sold to consumers in the United States.

19. ASR first announced the launch of the Kidz-Med Thermofocus in 2006.

20. The Kidz-Med Thermofocus is advertised throughout the United States, including in the state of Massachusetts.

21. The Kidz-Med Thermofocus is sold throughout the United States, including in the state of Massachusetts.

22. The Kidz-Med Thermofocus can be purchased by consumers in channels including the Internet and in retail stores.

23. The Kidz-Med Thermofocus has been advertised in print publications in

Massachusetts.

24. The Kidz-Med Thermofocus has been advertised in television commercials that have been shown in Massachusetts.

25. The Kidz-Med Thermofocus has been advertised on the Internet.

26. A consumer may purchase the Kidz-Med Thermofocus from the Kidz-Med website.

27. The Kidz-Med Thermofocus is advertised on the Kidz-Med website.

28. The ASR website includes press releases which discuss the features of the Kidz-Med Thermofocus thermometer.

29. Exergen and Kidz-Med compete for sales of thermometers to consumer.

30. The Kidz-Med website includes a study titled, "Comparative Study of body Temperature Measured with a Non-Contact Infrared Thermometer *Versus* Conventional Devices," which was performed at the Second Children's Clinic of the University of Milan ("Milan Study").

31. The Milan Study includes a comparison of the Thermofocus thermometer to the Exergen TemporalScanner.

32. The TemporalScanner and the Kidz-Med Thermofocus are sold in some of the same channels of commerce, including on the Internet.

33. The TemporalScanner and the Kidz-Med Thermofocus are both sold on Amazon.com.

34. The Temporal Scanner and the Kidz-Med Thermofocus are both sold on Walmart.com.

35. The Temporal Scanner and the Kidz-Med Thermofocus are both sold at Babies R

Us stores.

36. The Temporal Scanner and the Kidz-Med Thermofocus are both sold on the website for Babies R Us.

37. The Kidz-Med Thermofocus thermometers are provided with instructions for use. The paper instructions for use are also available on the Kidz-Med website. Defendants have knowledge of these instructions and intend that the Kidz-Med Thermofocus thermometers will be used according to these instructions.

38. Kidz-Med Thermofocus thermometers have been advertised and offered for sale in various channels of trade in commerce in the United States.

39. Kidz-Med Thermofocus thermometers and Exergen's TemporalScanner are competitive products.

40. The instructions for use for the Kidz-Med Thermofocus thermometers instruct users to aim the Kidz-Med Thermofocus thermometer at the center of the forehead in order to measure that skin and in turn, use that skin temperature as part of the process of providing a body temperature.

41. The instructional DVDs provided with the Kidz-Med Thermofocus thermometers instruct users to aim the Kidz-Med Thermofocus thermometer at the center of the forehead in order to measure that skin and in turn, use that skin temperature as part of the process of providing a body temperature.

42. Kidz-Med Thermofocus thermometers are normally used by aiming the Kidz-Med Thermofocus thermometer at the center of the forehead.

43. The instructions for use of the Kidz-Med Thermofocus thermometers do not include instructions for scanning the forehead to measure the temperature of the skin over the

temporal artery.

44. The Kidz-Med Thermofocus thermometers cannot be used to scan the forehead to measure the temperature of the skin over the temporal artery.

45. Instructions for use of the Kidz-Med Thermofocus thermometers are not designed to locate the temporal artery.

46. Users of the Kidz-Med Thermofocus thermometers are not intended to locate the temporal artery when they take the temperature of the skin at the forehead.

47. Kidz-Med Thermofocus thermometers, in measuring the temperature of the skin at the center of the forehead, do not measure the temperature of the skin over the temporal artery.

48. The paper instructions included with the Kidz-Med Thermofocus thermometer, telling users how to use the thermometer by aiming it at the center of the forehead, do not provide instructions that will provide users with a temperature that results from measuring the temperature over the skin of the temporal artery.

49. The instructional DVD included with the Kidz-Med Thermofocus thermometer, telling users how to use the thermometer by aiming it at the center of the forehead, do not provide instructions that will provide users with a temperature that results from measuring the temperature over the skin of the temporal artery.

50. Advertisements for Kidz-Med Thermofocus thermometers have falsely stated, including by necessary implication, that using the Kidz-Med Thermofocus thermometer will provide a temperature in connection with the measurement of the skin over the temporal artery.

51. Kidz-Med's advertisements for Kidz-Med Thermofocus thermometers have included the following statement ("Forehead Statement"), "The forehead is the ideal part of the body from which to take a temperature because it is supplied by the temporal artery, which

receives blood through the aorta and the carotid artery, guaranteeing a considerable flow of blood.”

52. The Forehead Statement was made by Kidz-Med for reasons including to influence consumers’ purchasing decisions.

53. The Forehead Statement was made by Tecnimed for reasons including to influence consumers’ purchasing decisions.

54. The Kidz-Med website has, in the past, included the following question and answer (“Temporal Artery FAQ”):

Q: How accurate is the Thermofocus?

A: Taking the temperature at the temporal artery (forehead) is deemed as accurate as a rectal thermometer, and more accurate than ear thermometers.

55. The Temporal Artery FAQ falsely states, including by necessary implication, that the Kidz-Med Thermofocus, in providing a temperature from a forehead measurement, measures a temperature taken at the skin over the temporal artery.

56. The Temporal Artery FAQ falsely states, including by necessary implication, that the temperature of the skin over the temporal artery is the same as the temperature taken at the forehead generally.

57. Kidz-Med included the Temporal Artery FAQ for reasons including to influence consumers’ purchasing decisions.

58. On its website, Kidz-Med has posted a document titled, “What the Experts are Saying” concerning Kidz-Med Thermofocus thermometers. (“Kidz-Med Expert Document”)

59. The Kidz-Med Expert Document is currently available on the Kidz-Med website.

60. The Kidz-Med Expert Document contains the statement, “There really is a need for something that is quick, accurate, noninvasive and nonirritating,” says Dr. Gary Fleisher, a temperature expert at Children’s Hospital, Professor at Harvard Medical School, and the lead author of the new study. Despite the popularity of tympanic thermometers, Dr. Fleisher said, “Their accuracy is less than desirable, and if people are currently using an ear thermometer, the temporal artery Thermometer is more accurate and easy to use.” High Fever, Meet High-Tech Thermometer, Shari Roan, Los Angeles Times, Monday, April 9, 2001.

61. The Kidz-Med Expert Document contains the statement, “However, the TA (temporal artery) thermometer is more accurate than the tympanic (ear) thermometer in infants, and it is better tolerated by infants than rectal thermometry.” David S. Greenes, Gary R. Fleisher, Division of Emergency Medicine, Children’s Hospital, Harvard Medical School, Arch. Pediatric Adolescent Med: March 2001, Vol. 155; 376-38.

62. Kidz-Med posted the Kidz-Med Expert Document for reasons including to influence customers’ purchasing decisions.

63. The Kidz-Med Expert Document falsely states by necessary implication that in normal use in providing a temperature from a forehead measurement, the Kidz-Med Thermofocus thermometer measures the skin over the temporal artery.

64. American Scientific Resources issued a press release in February 2006, titled “American Scientific Resources Announces U.S. Retail Launch of Thermofocus(R)” (“ASR Launch Release”).

65. The ASR Launch Release was issued through at least one press release distribution service, namely, Marketwire.

66. The ASR Launch Release has been and is currently available at the Marketwire



website at <http://www.marketwire.com/press-release/American-Scientific-Resources-Announces-US-Retail-Launch-of-Thermofocus-674802.htm>.

67. The ASR Launch Release contains the statement (“Launch Release Statement”), “The Thermofocus will be the newest product in the Kidz-Med line of children’s health and safety devices. The thermometer has patented infrared technology that allows a temperature to be taken without touching or waking a patient or sleeping baby. The device is totally non-invasive and takes a temporal artery temperature at the forehead, which is a preferred site because of its source of blood flow directly from the head. The Thermofocus is accurate, immediate, and hygienic because it never touches the body.”

68. The ASR Launch release has been and currently is available on the website of third party redOrbit, at:  
[http://www.redorbit.com/news/health/383932/american\\_scientific\\_resources\\_announces\\_us\\_retail\\_launch\\_of\\_thermofocus/#](http://www.redorbit.com/news/health/383932/american_scientific_resources_announces_us_retail_launch_of_thermofocus/#).

69. The ASR Launch Release has been and currently is available on the ASR website, including at <http://www.americansci.com/cms-newsdisplay/19.html>.

70. ASR issued the ASR Launch Release for reasons including to influence customers’ purchasing decisions.

71. The ASR Launch Release falsely states, including by necessary implication, that the Kidz-Med Thermofocus, will provide a temperature in connection with the measurement of skin over the temporal artery at the forehead.

72. American Scientific Resources issued a press release in August 2006, titled “American Scientific Resources Announces New Partnership” (“ASR Partnership Release”)

73. The ASR Partnership Release was issued through at least one press release

distribution service, namely, Marketwire.

74. The ASR Partnership release has been and is currently available at the Marketwire website at <http://www.marketwire.com/press-release/American-Scientific-Resources-Announces-New-Partnership-707171.htm>.

75. The ASR Partnership Release has been and can currently be found at the website: [http://findarticles.com/p/articles/mi\\_pwwi/is\\_200608/ai\\_n16633084/?tag=content;coll](http://findarticles.com/p/articles/mi_pwwi/is_200608/ai_n16633084/?tag=content;coll).

76. The ASR Partnership Release contains the statement (“Partnership Release Statement”), “The Thermofocus is the newest product in the Kidz-Med line of children’s health and safety devices. The thermometer has patented infrared technology that allows a temperature to be taken without touching or waking a patient or sleeping baby. The device is totally non-invasive and takes a temporal artery temperature at the forehead, which is a preferred site because of its source of blood flow directly from the head. The Thermofocus is accurate, immediate, and hygienic because it never touches the body.”

77. ASR issued the ASR Partnership Release for reasons including to influence customers’ purchasing decisions.

78. The ASR Partnership Release falsely states, including by necessary implication, that the Kidz-Med Thermofocus, will provide a temperature in connection with the measurement of skin over the temporal artery at the forehead.

79. A temperature taken at the forehead, as instructed by the paper instructions and DVD provided with the Kidz-Med Thermofocus thermometer, is less accurate than a temperature taken at the skin over the temporal artery.

80. Kidz-Med’s website has included a product information sheet about the Kidz-Med Thermofocus which states, “The Thermofocus uses totally safe infrared technology to instantly

read the core body temperature at the forehead. Taking the temperature at the temporal artery is deemed as accurate as rectal readings and more accurate than those taken at the ear. Thermofocus® is non-invasive, totally hygienic, and non irritating to babies and patients.” (“Kidz-Med Product Information Sheet”).

81. The Kidz-Med Product Information Sheet is currently posted on the Kidz-Med website.

82. Kidz-Med posted the Kidz-Med Product Information Sheet for reasons including to influence customers’ purchasing decisions.

83. The Kidz-Med Product Information Sheet falsely states, including by necessary implication, that the Kidz-Med Thermofocus thermometer measures the temperature of the skin over the temporal artery when it measure the temperature of the skin at the forehead.

84. Kidz-Med and ASR intend for purchasers of thermometers to rely on the above advertising statements in making purchasing decisions.

85. Kidz-Med and ASR expect that purchasers of thermometers will rely on the above advertising statements in making purchasing decisions.

86. Statements concerning the accuracy of thermometers marketed to the public are material and likely to influence purchasing decisions.

87. Statements concerning the temperature provided by thermometers marketed to the public are material and likely to influence purchasing decisions.

**ASR and Kidz-Med’s Advertising of the Never Touch Thermometer**

88. It was recently announced that Kidz-Med will be selling a new infrared non-contact thermometer, called the “Never Touch.”

89. In a disclosure dated December 16, 2009 (“December 16 Disclosure”), ASR

stated, "Our Company has decided to phase out the distribution of the Thermofocus® 5-in-1 thermometer due to lagging sales, and in favor of developing and distributing our own proprietary infrared and non-contact clinical thermometer, the Never Touch 5-in-1"

90. In the December 16 Disclosure, ASR stated, with respect to the Never Touch, "The Company has engaged a design engineer for the express purpose of designing and manufacturing their own non-contact thermometer. An FDA consultant has been engaged as well as a Chinese manufacturer. We will source and manufacture the components in China. Final assembly and packaging will be done domestically."

91. In the December 16 Disclosure, ASR stated, "We are planning to approach every major US retailer for [sic] in the Winter of 2009/2010 to secure shelf placement for this product for the 2010/2011 cough/cold season."

92. On December 28, 2009, ASR issued a press release titled, "New Revolutionary Thermometer Line to Launch" (December 28 Release).

93. The December 28 Release stated, "By utilizing the latest technological innovations, in managements' [sic] opinion, ASR was able to make this new device affordable for the consumer, as accurate as most trusted thermometers, and easy-to-use for a touch-less, instant temperature reading"

94. The December 28 Release stated, "The new thermometers will be partially manufactured in China at the Company's overseas location, with final sub-component assembly and packaging occurring at ASR's Ohio and Florida facilities."

95. The December 28 Release stated, "Production of the consumer model is scheduled to commence in February 2010 with, in managements' estimation, full production capability exceeding 5000 units per day."

96. The December 28 Release stated, “Private label and other branded versions are currently being marketed to large retailers, global distributors and healthcare providers. The thermometer is expected to be available for purchase in Q3 2010.”

97. The December 28 Release was distributed through press release service PRNewswire.

98. The December 28 Release is available at PRNewswire’s website at <http://www.prnewswire.com/news-releases/new-revolutionary-thermometer-line-to-launch-80195297.html>.

99. The December 28 Release includes a photograph of the Never Touch thermometer.

100. The December 28 Release is available on the ASR website at <http://www.americansci.com/cms-newsdisplay/112.html>.

101. Information from the December 28 Release was published on other Internet sites, including the sites for the Broward Alliance, HighBeam Research, and the Medical News.

102. News regarding the introduction of ASR’s new thermometer, including a link to the December 28 Release, was included on [www.coollest-gadgets.com](http://www.coollest-gadgets.com) at <http://www.coollest-gadgets.com/20091231/thermometer-line-ready-action/#more-36029> in a story titled, “New thermometer line ready to see action.” This story included a photograph of the new thermometer, which is labeled Never Touch 5-in-1.

103. On January 26, 2010, ASR filed an S-1 with the Securities and Exchange Commission (“January 26 S-1”).

104. The January 26 S-1 states, “The Company is also in the process of designing, manufacturing and registering its own non-contact thermometer under the name ‘Never Touch 5-

in-1.”

105. The above statements concerning the availability of the Never Touch are material and made to influence the purchasing decisions of purchasers of thermometers.

106. The above statements concerning the introduction of the Never Touch are material and are made to influence the purchasing decisions of purchasers of thermometers.

107. The above statements concerning the introduction the Never Touch are material and are made influence the purchasing decisions of purchasers of thermometers.

108. The above statements concerning the place of manufacture of the Never Touch are material and are made to influence the purchasing decisions of purchasers of thermometers..

109. The above statements concerning the timing of the production and availability of the Never Touch are material and likely to influence the purchasing decisions of purchasers of thermometers.

110. On February 11, 2010, there was a status conference in the litigation currently pending in the District of Massachusetts between Exergen Corporation and Kidz-Med, ASR, and Tecnimed S.R.L., Case No.08-cv-11416-DPW.

111. At the status conference on February 11, counsel for ASR and Kidz-Med, Richard Yeskoo, stated, with respect to the Never Touch:

Richard Yeskoo for Kids-Med and ASR. There are two issues, one which was just raised by counsel. My client's been developing a new device and is still at least six months from sale in the United States. They're trying to drag this new device, which is now in development in China, into this case, and we think that that's long past due so that's the dispute. We've said, you know, once we offer it for sale, we'll give you a sample but it's going to be at least six months from now. We don't have FDA approval; we don't have a final prototype; we haven't had patent review, so that's one issue. Since fact discovery is closed in August and we announced that we were developing this in December, I don't see how that

issue comes into this case.

112. Mr. Yeskoo's statement was made in open court.

113. Mr. Yeskoo's statement, particularly, "we don't have a final prototype," contradicts ASR's statements regarding the production, manufacture, and availability of the Never Touch.

114. Mr. Yeskoo's statement of February 11, 2010 contradicts ASR's statement in the December 28 Release, "Production of the consumer model is scheduled to commence in February 2010 with, in managements' [sic] estimation, full production capability exceeding 5000 units per day." (emphasis added).

115. Mr. Yeskoo's statement of February 11, 2010 contradicts ASR's statement from the January 26-S-1, "The Company is also in the process of designing, manufacturing and registering its own non-contact thermometer under the name 'Never Touch 5-in-1.'" (emphasis added).

116. Mr. Yeskoo's statement of February 11, 2010 demonstrates that ASR made literally false statements concerning the Never Touch thermometers and its and/or Kidz-Med's commercial activities in the December 16 Disclosure.

117. Mr. Yeskoo's statement of February 11, 2010 demonstrates that ASR made literally false statements concerning the Never Touch thermometers and its and/or Kidz-Med's commercial activities in the December 28 Release.

118. Mr. Yeskoo's statement of February 11, 2010 demonstrates that ASR made literally false statements concerning the Never Touch thermometers and its and/or Kidz-Med's commercial activities in the January 26 S-1.

119. Information concerning the introduction of the Never Touch has been published

online in Drug Store News. On March 16, 2010, this website included an article called, “New no-touch thermometer to hit store shelves this summer,” which stated, “American Scientific Resources plans to launch a premium thermometer — the Kidz+Med NeverTouch 5-in-1 — beginning Aug. 1.” This article also included a photograph of the NeverTouch in packaging with a caption stating, “The newest thermometer from American Scientific Resources: Kidz+Med NeverTouch 5-in-1.” This article is available online at:

<http://drugstorenews.com/story.aspx?id=133765&menuid=793>.

**COUNT I FALSE ADVERTISING**

**(15. U.S.C. § 1125(a))**

120. Plaintiff restates and incorporates herein by reference Paragraphs 1-119 as though fully set forth herein.

121. Statements, including those listed above, made in commercial advertising or promotion by Kidz-Med and/or ASR concerning the Kidz-Med Thermofocus thermometers and their necessary implications are literally false and misrepresent the nature, characteristics, and qualities of the Kidz-Med Thermofocus thermometers.

122. Statements, including those listed above, made in commercial advertising or promotion by ASR concerning the Never Touch thermometers are literally false and misrepresent the nature, characteristics, and qualities of the Never Touch thermometers.

123. Statements, including those listed above, made in commercial advertising or promotion by ASR concerning the Never Touch thermometers are literally false and misrepresent the nature, characteristics, and qualities of ASR’s commercial activities.

124. Statements, including those listed above, made in commercial advertising or promotion by ASR concerning the Never Touch thermometers are literally false and



misrepresent the nature, characteristics, and qualities of Kidz-Med's commercial activities.

125. The false statements deceived, and have a tendency to continue to deceive, a substantial segment of their intended audience.

126. The deception of the advertisements is material, and has influenced, and will continue to influence, the purchasing decisions of Exergen's potential customers, specifically, consumers of thermometers, including parents of minor children.

127. The false advertising concerning the Kidz-Med Thermofocus was put into interstate commerce by Kidz-Med and/or ASR, including by being published on the Kidz-Med website, the ASR website, and included in at least one press release distributed through a news service, and on information and belief, has been widely distributed to consumers of thermometers throughout the United States.

128. The false advertising concerning the Never Touch and the commercial activities of Kidz-Med and ASR with respect thereto have been included in at least one press release distributed through a news service, including in public disclosures and filings concerning ASR as a company, and on information and belief, has been widely distributed to consumers of thermometers throughout the United States.

129. The false advertising has injured, and is likely to continue to injure, Exergen.

130. On information and belief, the false advertising concerning the Kidz-Med Thermofocus has caused and will continue to cause Exergen to lose sales of its thermometers, and suffer additional damage for which it has no adequate remedy at law.

131. On information and belief, the false advertising concerning the Never Touch is likely to cause retailers and consumers to forbear from the purchase of Exergen thermometers and in turn, cause Exergen to lose sales of its thermometers, and suffer additional damage for

which it has no adequate remedy at law.

132. The false advertising concerning the Kidz-Med Thermofocus violates Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)), which prohibits defendants from using false or misleading representations of fact that misrepresent the nature, characteristics, or qualities, of their own or Exergen's products.

133. The false advertising concerning the Never Touch and the commercial activities of ASR and Kidz-Med violates Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)), which prohibits defendants from using false or misleading representations of fact that misrepresent the nature, characteristics, qualities, or geographic origin of their commercial activities.

134. Defendants' violation of the Lanham Act, as alleged herein, has been knowing and willful.

**WHEREFORE**, Exergen prays that this Court:

A. Enter an order preliminary and permanently enjoining each of the defendants, its agents and employees, and any others acting in concert with them, from committing false advertising and statements, described above with respect to the Kidz-Med Thermofocus thermometers.

B. Award Exergen monetary relief from defendants' false advertising, including but not limited to defendants' wrongful profits, Exergen's lost profits, and funds for corrective advertising, in an amount to be determined at trial, as well as treble damages.

C. Award Exergen its prejudgment interest and post judgment interest on its damages and award Exergen its costs; and

D. Award Exergen such other and further relief as it deems just and appropriate.

**JURY DEMAND**

Plaintiff demands a trial by jury.

Date: March 19, 2010

Respectfully submitted,

EXERGEN CORPORATION

By its attorneys,

/s/ Meredith L. Ainbinder

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